

November 30, 1770.

Unto the RIGHT HONOURABLE,

The LORDS OF COUNCIL AND SESSION,

THE

P E T I T I O N

OF

Messrs ALEXANDER SPIERS, Andrew Blackburn, and Andrew Syme, Trustees for the Creditors of James Dunlop, late Merchant in Glasgow,

Humbly sheweth,

THAT the said James Dunlop having stopped payment in November 1763, a meeting of his creditors was held at Glasgow upon the sixteenth of that month.

At this meeting, it appeared evident, that it would be most advantageous for the whole to follow joint measures. And a deed of concert was drawn up, and duly signed, by, at least, four fifths of the creditors, in point of value, by which they named the petitioners as trustees for the whole creditors, and agreed to convey to them their respective debts.

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By

11th Decr 1770

P. Spiers & Co.

15th Nov, 1770

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11th Feb 1771

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By this deed, it was likewise recommended to Mr Dunlop, to make a general conveyance of his whole estate to the petitioners as trustees for the creditors; and, in consequence of this recommendation, a disposition was accordingly granted to them by Mr Dunlop upon the 17th of the same month.

The petitioners readily agreed to accept the trust; and they may, without vanity, affirm, that neither time nor labour has been spared in endeavouring to execute it to the utmost advantage; and, had it not been for the different law-suits in which they have been involved with particular creditors who did not accede to the trust-right, but chose to follow separate measures, large dividends might have been made long ago.

Amongst others, the petitioners have been engaged in a question with Messrs Brown, Yule, and Co. merchants in Glasgow; the cause, and nature whereof, will appear to your Lordships from the following deduction.

The now deceased David Hutchison merchant in Greenock had been employed by Mr Dunlop as his tobacco-agent at that place; but had been dismissed from that employment some time prior to Mr Dunlop's failure. He had, however, in that character, received considerable sums of money on Mr Dunlop's account; and, in the course of investigation, it turned out, that, of these sums, he had applied to his own uses near L. 500 Sterling.

The petitioners, so soon as they got notice how matters stood with Mr Hutchison, sent Mr Dunlop, and David Watson, whom they had employed as a clerk, down to Greenock, in order to procure a settlement with him. Nothing was, however, at that time, effected to secure payment of the money due by Hutchison. But the petitioners having received information in November 1764, of a private transaction that was then going on between him and Josiah Corthine collector of the customs at Port-Glasgow, whereby the collector was to get an absolute security over Hutchison's lands of Little Batturick, for payment of debts due to him, they became justly alarmed; and, after advising with their agents, both in Glasgow and Edinburgh, they were directed, by all means, to obtain

obtain from Hutchison a bill, at one day's date, for the sum due by him to Mr Dunlop, so as to enable them, if possible, to be on equal terms with Mr Corthine.

With this view, Mr Hutchison was sent for; and, though he could not be prevailed with to accept a bill to the petitioners, the trustees for the creditors, he agreed to grant his acceptance to Mr Dunlop himself for L. 516:8:2, being the amount of the sum due by him, payable one day after date; and, in security of this debt, he, at the same time, indorsed to Mr Dunlop a bill for L. 200, accepted by William King merchant, and James King shipmaster at Port-Glasgow.

This bill of L. 516:8:2 is of the hand writing of David Watson clerk to the trustees; and, so soon as the petitioners got notice of its being accepted, they ordered it to be protested, and sent to Alexander Gray writer to the signet, their doer at Edinburgh, with directions to take every proper step, either for setting aside the transaction with Mr Corthin, or securing a preference upon equal terms with him.

In consequence of these directions, Mr Gray immediately raised horning and inhibition against Hutchison; and, so soon as the days of the charge expired, took out letters of caption against him, with a view to render him bankrupt, in terms of the act 1696, in order to defeat the partial preference which he had been endeavouring to give to Mr Corthine.

The manner in which this partial preference was intended to be created, was as follows:

Upon the 6th of August 1762, Mr Hutchison had granted a disposition of his lands of Little Batturick to Robert Donald merchant in Glasgow, qualified by a back-bond of even date, whereby Mr Donald obliged himself to denude of these lands in favour of Mr Hutchison, his heirs and assignees, on their making payment of certain sums therein mentioned. And, upon the 13th of October and 6th of November 1764, Mr Donald and Hutchison granted a joint disposition of these lands to Mr Corthine, his heirs and disponees, who was accordingly infeft upon the 27th of the month

month of December following, in virtue of the precept of seifine contained in that disposition.

The petitioner's doer having got full information with regard to this transaction with Mr Corthine ; and having received the opinion of most eminent counsel, that the disposition to Mr Corthine would undoubtedly be voided, upon Hutchison's being rendered bankrupt in terms of the act 1696, at any time within sixty days of the date of the infestment taken upon that disposition ; he immediately applied to Mr Corthine's doer ; and, after representing to him, that the petitioners were resolved to set aside the said disposition and infestment as a partial preference, the consequence whereof would be, that in the end, Mr Corthine might draw but a small part of the debt, it was then agreed, that Mr Corthine should communicate the benefit of the infestment which he had taken upon the 27th of December, upon the disposition from Hutchison and Mr Donald, to Mr Dunlop, and the trustees for his creditors, in proportion to the debt due to them in consequence of Hutchison's bill ; and that, on the other hand, Mr Dunlop should communicate to Mr Corthine the benefit of the L. 200 bill, accepted by William and James Kings, which had been indorsed to him by Hutchison.

In consequence of this agreement between the parties doers, a tripartite contract was entered into, of date the 21st of February and 2d July 1765, between the said Josiah Corthine, James Dunlop, and David Hutchison ; by which, after narrating the disposition to Mr Corthine, and reciting several debts due to him by Hutchison, and mentioning that the bill of L. 56 : 8 : 2 due to Mr Dunlop by Hutchison, with certain diligences done thereon, had been conveyed by Mr Dunlop to Mr Corthine, the said David Hutchison and James Dunlop concurred in assigning to Mr Corthine the foresaid L. 200 bill accepted by William and James King ; and, on the other hand, the said Josiah Corthine declared, that the said lands of Little Batturrick, although absolutely disposed to him, were only to be considered as a security in his person for the whole of the debts mentioned in the said tripartite contract.

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By this deed, Mr Corthine further became bound, in the event of David Hutchison's making payment against the term of Martinmas 1765, of the whole debts therein mentioned, and of the expences that might be incurred, to reconvey to him the said lands of Little Batturrick, together with the said debt due by William and James King, and the security for the price of a house sold by Hutchison at L. 103, which had likewise been conveyed to Mr Corthine ; but, with this provision, that, in case the said David Hutchison should fail to redeem at the said term of Martinmas 1765, it should be competent to Mr Corthine to sell the whole subjects by public roup ; and, in case no purchaser should appear either then, or by private sale, within the term of twelve months from the date of the contract, at a price to be fixed by neutral persons, Mr Corthine should be allowed to hold the lands at such a price as should be put upon them by the sheriffs-depute of Dumbarton and Renfrew. Mr Corthine likewise became bound by this contract, in the event of the lands not being redeemed by the said David Hutchison, in the manner therein mentioned, to apply the price equally and proportionally betwixt himself and the said James Dunlop, according to the debts due to them, and also to pay Mr Dunlop the like just and rateable proportion of the sums that might be recovered from the said William and James King, or from the price of the house which had been sold by David Hutchison, as already mentioned.

Although Mr Dunlop was the nomiaal party to this transaction ; yet, in fact, he had no concern therein whatever. The whole was the operation of the petitioners acting for the behoof of the creditors in general, who were certainly intitled to use his name in any way they might judge most advantageous to their management. Indeed, they would scarcely have thought it necessary to make him denude himself in a formal manner in their favour, had he continued in this country ; but, as they found it expedient to send him out to America in August 1765, it occurred to them, that it might be proper to take an assignation from him, to prevent any obstacle on account of his being forth of the kingdom ; which was accordingly executed upon the 14th of August 1765.

Messrs Brown, Yule, and company, merchants in Glasgow, being creditors to Mr Dunlop in their own right, and as trustees for Mr James Corbet by two several bills, the one for L. 288 : 8 : 4, and the other for L. 250, both dated first August 1763, and payable six months after date, they did not think proper to accede to the trust-right, and chose rather to follow separate measures. They accordingly used arrestments upon the above grounds of debt, upon the 4th of April 1765, in the hands of Mr Hutchison and Mr Corthine; they likewise used other arrestments, upon the 16th of October 1766, in the hands of John Campbell writer in Glasgow, and John Schaw land-surveyor there, as commissioners for Mr Corthine, who, before that time, had gone to be collector of the customs at Hull, and also in the hands of James Graham writer in Glasgow, who had purchased the said lands of Little Batturick; and, upon the 17th of the same month, they likewise executed a new arrestment in the hands of Mr Corthine himself, at the market cross of Edinburgh, pier and shore of Leith.

Upon these arrestments, Messrs Brown, Yule, and company brought several processes of forthcoming; and, the whole having been remitted to the Lord Auchinleck Ordinary, the petitioners appeared for the interest of Mr Dunlop's creditors in general, and contended, that they fell to be preferred; and the Lord Ordinary having appointed memorials to be given in, his Lordship was pleased, upon the 23d of December 1769, to pronounce the following interlocutor: 'The Lord Ordinary having considered the mutual memorials, and the answers for Brown, Yule, and company, with the several writings referred to therein, repels the plea of preference insisted on by the trustees of James Dunlop; and finds, that, as the trust-right was granted by Dunlop after he was become a notour bankrupt in terms of the act 1696, the trustees have no right to compete with Brown, Yule, and company, the lawful creditors of Dunlop, anterior to the trust right; finds, That Brown, Yule, and company, in virtue of their arrestments in the hands of David Hutchison, upon the 4th of April 1765, have habilely attached the sum of L. 516 : 8 : 2 sterling, contained
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' in Hutchison's bill to Dunlop; and that, as they have recovered
 ' a decreet of forthcoming against the representatives of David
 ' Hutchison, who is now dead, they are intitled not only to put that
 ' decreet to execution for recovery of payment of Dunlop's debt to
 ' them out of the foresaid L 516 and a fraction, which was due
 ' by Hutchison to Mr Dunlop, but to attach habilely any of Hut-
 ' chison's effects, in whose hands soever they are; but finds the ar-
 ' restment used by them in the hands of Mr Corthine, as debtor to
 ' Hutchison, upon the day of May 1765, can carry nothing,
 ' in respect at that time Mr Corthine was not debtor to Hutchison,
 ' having had no intromission with Hutchison's effects, though dis-
 ' posed to him; finds Brown, Yule, and company, in virtue of
 ' their arrestments in the hands of Mr Corthine as debtor to Dun-
 ' lop, upon the 4th of April 1765, can take nothing, as Corthine was
 ' not at that time debtor to Dunlop; and that they can take no-
 ' thing in virtue of their arrestments in the hands of John Campbell,
 ' John Schaw, and James Graham, in respect none of these per-
 ' sons were debtors to Dunlop; but finds, that they are intitled, in
 ' virtue of their arrestment in the hands of Mr Corthine, on the
 ' 17th of October 1766, to call Mr Corthine to an account for the
 ' intromissions he then had with Hutchison's effects, in consequence
 ' of the contract between Hutchison, Corthine, and Dunlop; and
 ' repells the objection to the arrestments founded on Corthine's ha-
 ' ving, at the date of it, returned to England, in respect it was used
 ' at pier and shore, and the ground of debt was in this part of the
 ' united kingdom; but finds, That Mr Corthine is only bound to
 ' accompt in terms of the contract entered into between him, Hut-
 ' chison, and Dunlop, in regard the effects conveyed to him came
 ' from Hutchison, who is not alledged to have been under any
 ' legal disability to convey; and appoints Mr Corthine to give in
 ' an accompt of charge and discharge against himself of his intro-
 ' missions with the effects of Hutchison conveyed to him for his
 ' own behoof, and that of James Dunlop, and this to be done a-
 ' gainst the second sederunt-day of January first.

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The petitioners preferred a representation against this interlocutor, in so far as it found, that they had no right to compete with Brown, Yule, and Co.; and that Brown, Yule, and Co. had habilely attached, in virtue of their arrestment in the hands of David Hutchison, upon the fourth of April 1765, the sum of L. 516:8:2, contained in the said David Hutchison's bill to James Dunlop; and that they were intitled to put their decret of forthcoming against the said David Hutchison to execution, for recovery of Dunlop's debt to them, out of that sum, or out of any of Hutchison's other effects. And also, in so far as it found that they were entitled, in virtue of their arrestments used in the hands of Mr Corthine, upon the 17th of October 1766, to call Mr Corthine to account for the intromissions he then had had with Hutchison's effects, in consequence of the tripartite contract.

Upon this representation, the Lord Ordinary pronounced the following deliverance of the 27th of January last: 'The Lord Ordinary having considered this representation, finds no sufficient reason shown for altering the interlocutor in the particulars herein represented against; and therefore adheres thereto, and refuses the desire of the representation.' And to these interlocutors, his Lordship again adhered, upon the 17th of June last, upon advising another representation and answers.

As Messrs Brown, Yule, and Co. had, in their answers to this last representation, made sundry strong alledgeances, both with regard to the nature of the trust-right, and with regard to the conduct of the trustees, which were absolutely destitute of foundation, it became necessary to correct these misrepresentations. The petitioners therefore preferred another representation, which was appointed to be answered; and, upon the 16th current, the Lord Ordinary pronounced another interlocutor in the following terms: 'The Lord Ordinary having again considered this representation, with the answers, adheres to the former interlocutor, and refuses the desire of the representation; reserving the consideration of the question, so far as concerns James Graham, from whom the pursuers were found intitled

entitled to draw nothing by their arrestments, in respect he had no effects of Dunlop's in his hands, till Mr Graham shall depone, and it appear, whether he had effects of Dunlop's in his hand when the arrestment was used, or not.

The petitioners now beg leave to submit their case to your Lordships; and they are hopeful, that, after considering the whole circumstances attending it, you will see cause for altering the interlocutors pronounced by the Lord Ordinary, in so far as they have been complained of.

The petitioners are sensible that, of late years, dispositions granted by a bankrupt to trustees, for the behoof of his creditors in general, have been much cried down; and that even the very trust right in question was disregarded both by your Lordships and in the last resort, in a competition between the petitioners and Mess. Alexander and Thomas Peter merchants in Glasgow. But as the decision in that case cannot be pleaded on as a *res judicata* in the present; and as the disposition by Mr Dunlop to the petitioners stands still unreduced, and was even sustained as a good title for the petitioners intermitting with Mr Dunlop's effects in America, in a late question that depended between them and Mess. Peters, Bogle, and Marshall, of Glasgow, they hope to be forgiven for still offering a few observations upon the general point.

The petitioners do not mean to contend, that a person who is bankrupt should have it in his power to convey his effects to trustees of his own nomination. Such power might be productive of bad consequences. Neither do they mean to contend, that a disposition from a bankrupt, even to persons named by his creditors, should have the effect to deprive any one creditor of the benefit he has already acquired by the diligence of the law. But they must own they are still at a loss to discover a solid principle upon which it can be maintained, that a disposition *omnium bonorum*, granted by a bankrupt, not to persons of his own choice, but to trustees named by a great majority of his creditors, and by which no undue preference to any particular set of creditors is endeavoured to be introduced, should be set aside, so far as to debar the trustees acting under such disposition from competing with creditors who had done no

diligence at the time of its being granted, and are endeavouring, by diligence used posterior to its date, to secure full payment to themselves, to the prejudice of the other creditors who acceded to it in the expectation that every one was to get a fair and just proportion of the common debtors effects. Such, however, is the nature of the present trust-right; nay further, it is an uncontrovertible fact, that, at the time of its being executed by Mr Dunlop, neither Mess. Brown, Yule, and company, nor any of the other non-acceding creditors, had *parata executio* whereby to render Mr Dunlop bankrupt in terms of the statute 1696, within 60 days of its date; and that the only steps for rendering him bankrupt, in these terms, were taken by the petitioners themselves, with a view to cut down certain partial preferences which he had been induced to give to particular persons; and thereby increase the fund of general distribution. — Mess. Brown, Yule, and company, indeed, were pleased to alledge, that the very diligence upon which Mr Dunlop was rendered bankrupt, was done by the tann-work company of Glasgow, who were not then acceders, nor in any concert with the trustees, though they have since acceded. But this, like many others of these gentlemen's alledgements, is altogether destitute of foundation. A partner of that company was present at the meeting of the 16th of November 1763, and the grounds of debt due to the company were given up to the petitioners, for the purpose of using ultimate diligence against Mr Dunlop. Of this fact, if denied any longer, the petitioners are most willing to undertake a proof, *sub periculo cause*.

Mess. Brown, Yule, and company, who shall hereafter be called the Pursuers, were likewise pleased to alledge, that the trust-right was by no means generally approved of; that many persons to whom Mr Dunlop was indebted in large sums, amounting altogether to about L. 15,000 sterling, stood out against it, and proceeded in separate diligences; that the disposition contained a very glaring partial preference in favour of a particular class of creditors, who, because they were cautioners in a debt due by Mr Dunlop to the public, pretended that they had thereby a hypothec, or preferable right,

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over the other creditors; and that, in short, this scheme of a trust-right was hardly acquiesced in by any but Mr Dunlop's own friends and favourite creditors.

This is, however, a most unfair representation of the case. It has already been mentioned, that the trustees were named by the acceding creditors, who had debts in their persons to the amount of L. 45000 Sterling, and of whom many had it in their power to have excluded not only the pursuers, whose debts were not payable for some months thereafter, but all the other creditors who have been following separate measures, none of whom were in readiness to do diligence. It is therefore absurd to talk of its being acquiesced in only by Mr Dunlop's own friends and favourite creditors. On the contrary, his friends and favourites had taken too great care of themselves, by obtaining partial preferences from him some time before the date of the trust-right. And it was with the sole view of setting aside those preferences, that the petitioners took measures for rendering him bankrupt in terms of the act 1696. Neither is it true, that it contained any clause to make way for a partial preference in favour of a particular class of creditors. The only pretence for making this alledgeance, is a clause, by which it was provided, that the trustees should be obliged to apply the first and readiest of the subjects that might be recovered by them, for payment and extinction of the bonds granted by Mr Dunlop and his co-obligants to the crown, for the duties of tobacco imported by him at the ports of Greenock and Port-Glasgow. But, in the first place, this supposed preference was not the deed of Mr Dunlop, but was expressly stipulated in the deed of concert which was executed by the creditors themselves upon the 16th of November 1763. In the next place, Mr Dunlop's co-obligants to the crown had got from the exchequer fiats for issuing writs of extent upon his effects, whereby an absolute preference was secured in their favour; and, with this aid in their hands, they appeared at the meeting of Mr Dunlop's creditors upon the 16th of November, and let them to understand what they had in their power to do. In such a situation, the creditors had not an alternative; they must either submit to a proviso in favour of those

those who had got the preference from the court of exchequer, of the whole execution of the trust right must have been embarrassed and confounded by those preferable creditors attaching the subjects of the trust in virtue of the diligence of extent.

The pursuers were likewise pleased, in order to create a prepossession against the trust-right, to alledge, that Mr Dunlop continued to manage and transact many particulars of his business without any intervention of the trustees; and, in particular, that he endeavoured to keep the transaction with Mr Corthine and Hutchison a secret, both from his trustees and his other creditors. But this alledgeance is also perfectly void of foundation, which, if not known to the pursuers themselves, cannot fail to consist with the knowledge of their agent in this cause. It has already been mentioned, that the whole of this transaction, tho' in Mr Dunlop's name, was carried on by the petitioners, and by their agent at Edinburgh. And that Mr Dunlop did not act in those affairs in a private manner, is not only plain from the deduction already given, but must appear still more evident to your Lordships, from a circumstance now to be mentioned. Prior to Mr Dunlop's failure, Mr William Wilton writer to the signet, who is the pursuers agent in this cause, was his ordinary doer. But, as soon as the trust-disposition was executed, Mr Gray, who was concerned for a number of the acceding creditors, was appointed agent for the trustees. And, altho' Mr Wilton continued to act in matters wherein Mr Dunlop himself was personally interested, it was Mr Gray to whom the bill and protest were sent, in order to raise inhibition and caption against Hutchinson; and it was he alone who made the agreement with Mr Corthine's agent, in consequence of which the tripartite contract above mentioned was carried into execution. Neither did Mr Dunlop ever interfere in the management of any thing whatever, after the trust-disposition was granted, but under the orders and directions of the trustees. It is well known, that, in all cases of bankruptcy, where trust-rights are granted, and especially when the trustees have it not in their power to be fully acquainted with the transactions of the bankrupt, it becomes absolutely necessary for

for them to have recourse to his aid and assistance. In the present case, Mr Dunlop's transactions were so large and extended, his funds so widely dispersed over different corners of the world, and the matters to be settled so very various, that, without his own assistance, it would have been totally impossible to extricate the trust, or to do any thing for the benefit of the creditors. The trustees did therefore, with the special consent of the creditors, employ him as a clerk or factor under them; and they have now the satisfaction to know, with certainty, that their sending him out to America in that character was a measure the most beneficial to the creditors. But it is a gross misrepresentation to alledge, that he was allowed to continue to manage his own affairs, as has been set forth by the pursuers.

That an equal distribution of a bankrupt's effects amongst his creditors in general, is not only most strongly founded in equity, but also most expedient in a country where commerce is upon the growing hand, and where foreign trade is ripening to maturity, must be admitted by every person who will give the smallest attention to the subject. And that it was the object of the legislature of this kingdom, while trade was even in a mere state of infancy, cannot be disputed. The act 1621 was intended to preserve this equality, by preventing bankrupts from defrauding their creditors, by conveyances to conjunct or confident persons, without a valuable consideration, and restraining partiality to favourite creditors to the prejudice of those who were in *curfu diligentiae*. This, however, was not found sufficient to serve the end proposed. Bankrupts had it still in their power to execute conveyances of their effects to favourite creditors, prior to diligence being used against them; but, as this was adverse to the idea of an equal and impartial distribution, so it was remedied by the act 1696. Other expedients were likewise found for maintaining equality amongst creditors. Originally, all apprisings were ranked according to their priority in point of time; but as this proved often a hardship upon absent creditors, who, however vigilant, had it not in their power to use so early diligence as those who were at hand, it was removed by the act 1661; by

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which all apprisings led within year and day of each other, or within year and day of the first apprising made effectual by a charge against the superior, were brought in *pari passu*. A similar remedy was likewise introduced by the act of sederunt 28th February 1662; by which all the creditors of the defunct, who did diligence within half a-year after his death, by citation of the executors and intromitters with his goods, or by obtaining themselves confirmed executors creditors, or by citing any other executors-creditors confirmed, were made *pari passu* preferable with those who had used more timely diligence.

The above instances clearly show, that a fair and equal distribution of a bankrupt's effects, entered strongly into the ideas of the legislature, even when it was less necessary than now, that the commerce of the country, and of consequence the intercourse with foreigners, and persons residing in different parts of the world, is so greatly increased. It is true, indeed, that hitherto this equality has not been enforced by statute in every event. Arrestments at the suit of every individual creditor are allowed whether the debtor is in a state of bankruptcy or no; and other steps of diligence may be carried on. But what the petitioners endeavour to infer from what they have already said upon this head, is, that, as an equal distribution has been guarded as much as possible in some cases, a deed granted by a bankrupt, on purpose to carry that equal distribution into full execution, cannot be repugnant to the general ideas of the laws of this country, and must therefore be valid, unless it can be shewn to fall under the express prohibition of a particular statute.

That the trust-deed in question does not fall under the sanction of the act 1621, the pursuers must of necessity admit. It was not granted to conjunct or confident persons of the bankrupt. On the contrary, it was executed in favour of trustees named by more than four-fifths of the creditors, both in number and value. It was not granted without a true, just, and necessary cause; on the contrary, it was made for the just purpose of paying the debts that were due by the granter: Neither can it be said to have been granted in defraud

fraud of the more timely diligence of another creditor; because none of those who did not voluntarily accede to it had done any diligence whatever.

The only question, therefore, in point of law, is, Whether it falls under the prohibition of the act 1696? And, when the words of that statute are considered with any degree of attention, it appears to the petitioners, with all submission, impossible to maintain the affirmative. The words are, ‘ His Majesty, with consent of the estates of parliament, declares all and whatever voluntar dispositions, assignments, or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favour of *any* of his creditors, either for *his* satisfaction, or further security in preference of his other creditors, to be void and null.’ The plain import of this clause is, that all deeds granted by a bankrupt, either to one creditor, or to one particular set of creditors, in preference of the rest, shall be void. But there are no words to found a prohibition to grant a deed in favour of the whole; for, as in doing so, he commits no injustice or partiality, but, on the contrary, puts them all upon an equal footing, it is absolutely impossible to say, that a preference has thereby been created to any of them to the prejudice of the others.

The pursuers may perhaps appeal to some late decisions, where particular creditors who had used diligence, were preferred to trustees acting for behoof of the whole in consequence of a disposition from the bankrupt. But the petitioners will take the liberty to say, that, except in the single question betwixt them and the Messrs Peter, which shall be particularly considered in the sequel, no instance is to be found where a fair trust-deed granted by a bankrupt to trustees of the creditors own nomination, and clogged with no improper powers or conditions, was set aside at the suit of creditors who had used no diligence prior to its date.

The question first occurred in the competition between the creditors of Mr David Watson, and Muirhead of Linhouse; 17th November

vember 1725. Watson conveyed his estate in favour of his creditors, 'to be disposed of by them, or their trustee, and the price to be applied towards the payment of their debts equally and proportionally, according to their several rights and diligences.' Muirhead did not accede, and used an arrestment in the hands of William Violent, who owed the bankrupt 8000 merks. The disposition to the creditors was dated the 2d; and intimated to Violent upon the 3d May. Muirhead's arrestment was used upon the 13th of the same month; and the court found, 'That a disposition, simple, unqualified, and compleated by a bankrupt in favour of his whole creditors, was not reducible upon the act 1696, at the instance of a posterior arrester.'

The next case which occurred, is thus collected in the dictionary: 'A disposition by a bankrupt to trustees in favours of his whole creditors was sustained, notwithstanding of prior charge of homing; and the trustees preferred to the charger July 1729; Competition, Farquharson and creditors of Cumming.'

This decision went further than the petitioners plea, and was not perhaps perfectly consistent with the statute 1621; and accordingly, when a similar case came again to be tried, Mansfield against Brown and Strobo, a contrary judgment was pronounced 28th January 1735. But still it may be founded on as an express approbation of trust-deeds, prior to the using of diligence, and shews how strongly the court was then inclined to preserve an equality amongst creditors in the distribution of a bankrupt's effects.

The next two cases that occurred are likewise collected in the following words: 'A bankrupt having granted a disposition of his whole effects to certain trustees for the behoof of all his creditors, in a reduction of the same, upon the act 1696, the reasons were, that the bankrupt was disabled from granting such a right, though not directly in preference of one creditor to another; yet indirectly, by putting all upon an equal footing, the most remiss with the vigilant. 2do, The trustees were of the bankrupt's own naming and his nearest relations; and these trustees are invested with most unreasonable powers; such as, to adopt creditors or not at their pleasure; to di-

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vide the price of the effects among the creditors without being liable to any check, they being impowered so to do as arbiters; and, in that capacity, to determine also the expences of management. It is also declared, that they shall not be made liable for omissions. And, *lastly*, That there is a forfeiture upon the creditors who should quarrel or impugn the right granted to these trustees, or who should use separate diligences. The Lords found the reasons of reduction relevant; and, at the same time, laid hold of this opportunity to declare their sentiments against all such dispositions in general; and, in that view, caused insert the following clause in their interlocutor: *And further find, That no disposition by a bankrupt debtor can disable creditors from doing diligence*; 12 July 1734. Snee and company contra trustees of Michael Anderson. The like found, 3^d February 1736, Earl of Aberdeen contra trustees for the creditors of Blair.

These two cases, which, from the manner in which the second is stated by the collector, appear to have been similar, differ most materially from the present; as powers were thereby given to trustees of a bankrupt's own nomination, of a very dangerous nature, and inconsistent with the view of a fair and impartial distribution of the whole effects amongst creditors in general; whereas the present trustees were not only named by the creditors themselves, but were also subjected to have their transactions inspected by others, and were taken bound to execute the trust for the use and behoof of the whole just and lawful creditors, to the amount and extent of their just and lawful debts. Indeed the forfeiting clause, and the appointing the trustees arbiters betwixt the several creditors, and allowing them to determine the expences of their management, were exertion of power which no debtor whatever could have any pretence to arrogate to himself.

It is true, indeed, that in the case of Snee, the court seems to have laid it down as a general rule to be followed thereafter, that no disposition, by a bankrupt debtor, should disable his creditors from doing diligence. But, the petitioners will be allowed to observe, that a mere declaration of a court, which does not apply to the pre-

case under consideration at the time, cannot be pleaded upon as a decision. It would seem that the apparent inexpediency of the deed, when under the immediate view of the court, had created a prepossession against every disposition by a bankrupt in favour of his creditors; however clear it may now appear, that such dispositions must alwise be attended with the greatest advantages when fair and unexceptionable. And accordingly a different judgment was pronounced the very next time the general point came to be tried, in the case of the creditors of Patrick and James Jackson. These bankrupts conveyed such part of their effects as had not formerly been carried off by diligence, to a trustee for behoof of their whole creditors. Simpson a creditor, who was not present at the meeting where the disposition was executed, refused to accede; and, after the trustee had recovered part of the effects so conveyed, used an arrestment in his hands: But the court found, that this arrestment was not effectual against the trust-disposition, and assilzied the trustee from the action of forthcoming which had been brought against him.

It was also found, in the case of Andrew Stalker against Andrew Ayton, 9th February 1730, that where goods were put into the hands of a trustee to be sold and applied to creditors, an arrestment in the trustees hands, after the sale of these goods, was altogether ineffectual.

There is indeed a later decision in 1764, Elisabeth Moodie against the creditors of Robert Strachan, which may possibly be laid hold of by the pursuers; but, when that case is looked into, it will appear very different from the present. The trust-disposition was executed only upon the 17th of June, and the roup of Strachan's furniture, and other goods, which were sold by the trustee, was not finished till the 18th of that month; whereas Elisabeth Moodie had used an inhibition in the end of May, and had likewise executed letters of horning against Strachan, several days prior to the date of the trust-right, which gave her the benefit of the act 1621; and, altho' she stopped proceeding in further diligence for a few days, at the particular desire of two gentlemen who came to her in Strachan's name, and assured her that she should have full satisfaction of her debt,

debt, she went on to use arrestments upon the 18th, 23d and 24th, and had just reason to complain of the trust-disposition as a fraudulent deed *quoad* her, especially after the message sent to her in Strachan's name, as already mentioned. The petitioners are also informed, that a partial preference was directly given in the disposition to two particular creditors; and, on these accounts, it is impossible to hold that case as a precedent in the present question.

Such is the state of the decisions of the court, so far as they are known to the petitioners, down to the case betwixt them and the Messrs Peter of Glasgow; and, from thence it appears evident, that, till then, no instance has occurred, where a fair disposition by a bankrupt in favour of his whole creditors has been set aside, either as falling under the statute 1696, or as reducible at common law. The petitioners shall therefore now proceed to consider, whether the single decision last mentioned ought to have the effect at once to overturn what was in former times understood to be the law of the land, and to put a stop for the future to a mode of doing equal and impartial justice to creditors in general; without which it cannot be supposed that the merchants and traders in this country can expect any credit whatever in foreign parts.

The petitioners do not mean to dispute, that a *series rerum similiter judicatarum* may establish the law of this country upon any one particular point. However repugnant such decisions may appear to principles, it is highly necessary for the good of society that they should have that effect; but, from thence it must necessarily follow, that a single decision, in opposition to a number of others, can have no such operation, for this good reason, that it is repugnant to the consuetudinary law already established by a course of precedents in former cases. If, therefore, upon a thorough investigation of the former decisions, your Lordships shall be satisfied that every fair and simple conveyance by a bankrupt in favour of his whole creditors, or of trustees recommended or approved of by them, has been sustained, when attempted to be set aside by those who had done no diligence

diligence prior to its date; you, surely, will not think yourselves bound to depart from such general practice, merely because, in one particular case, a different rule has been followed; and far less will you think yourselves bound to adhere to that single decision, if, upon a review of the principles of law in an after question, it shall appear to have been erroneous.

It is true, that the decision in the case of Messrs Peter seems to have obtained the sanction of the house of Lords: But, if the petitioners are not greatly misinformed, the judgment of that Right Honourable House did not proceed upon a consideration of the general question, but upon a particular point which was not insisted on in the debate before this court.

The trust-disposition executed by Mr Dunlop, though fairly granted with a view to do all possible justice to the creditors in general, without any partiality whatever, contains a proviso in the following words: 'Providing always, as it is hereby expressly provided and declared, That the said trustees, or their quorum, by their acceptance hereof, are and shall be obliged to apply the first and readiest of the said subjects and estate that may be recovered by them for payment and extinction of the bonds granted by me and my co-obligants to the crown, for the duties of tobacco imported by me at the port of Greenock or Port Glasgow, as the said duties become due, which said duties are and shall, by express condition hereof, be paid by and deducted by the said trustees out of the first and readiest of their receipts or intromissions in the premises.'

The Mess. Peter did not think it of any consequence to found upon this clause, in the course of the proceedings before this court, because they knew they would immediately receive a most satisfactory answer, viz. that, prior to the executing the trust-disposition, and Mr Dunlop's bankruptcy, which was brought about solely by the diligence used by the trustees, writs for writs of extent had issued from the exchequer, that would have effectually secured a preference to the crown upon the common debtors effects, to the amount of the whole duties due by him; and that the *proviso* was therefore introduced only to prevent embarrassment

ment in the execution of the trust, by these writs of extent being carried into execution.

Such being the case, the petitioners had no reason to suspect that the above *proviso* would have been laid hold of in the last resort; but it appears from the printed case, given in for the Mess. Peter, that they there founded upon it as establishing a partial preference to a particular set of creditors, viz. those who were co-obligants with Mr Dunlop, in the bonds which were granted to the crown for the duties of tobaccos imported by him. And the counsel for the petitioners (the appellants) never having been informed of the real matter of fact, viz. that fiats for writs of extent had issued, prior to the bankruptcy, and to the execution of the trust-deed, and that of consequence no other partial preference had been established by the above clause, but what must of necessity have taken place; they were unable to make a proper answer; and the petitioners had the misfortune to meet with a judgement upon a point, as to which full information had not been laid before the House of Lords; whereas, if the real matter of fact had been properly explained, it is believed no such judgement would have been pronounced.

The petitioners shall trouble your Lordships no longer on the general point. They are hopeful that, after what has been said, you will be clearly of opinion that a fair and absolute disposition, by a bankrupt, in favour of his whole creditors, although it may not have the effect to take away the force of diligence used by any particular creditor, prior to its date, yet stands clear of any ground of reduction, either upon the statutes or common law, at the suit of a creditor who has done no diligence, prior to the time of its being granted. But, even supposing the petitioners to be mistaken in their apprehensions of the law on this head, they are hopeful to be able to satisfy your Lordships that there are other circumstances attending the present case, which ought to prevent the pursuers from carrying any thing in consequence of the arrestments which have been used by them.

And, in the *first* place, the petitioners are advised, that whatever title the pursuers might have had to compete with them, if the ar-

restment's had been used prior to the 21st of February 1765, when the tripartite contract was signed by Hutchison and Corthine, no arrestment subsequent to that time could have any operation; because from that moment the debt due to Mr Dunlop became heritable. The disposition and infestment, in Mr Corthine's person, were thereby communicated to that debt, and it then became a real burden upon the lands disposed by Hutchison. It was therefore an heritable subject, to all intents and purposes, and of consequence incapable of being attached by arrestment, as much as if Dunlop himself, or the trustees for his creditors, had been actually infest in Hutchison's lands. It is by the tripartite contract alone, that the nature and extent of the right granted to Mr Corthine can be ascertained; and as that contract declares, that the lands, though absolutely disposed to him, were only to be considered as a security in his person for the debts therein mentioned, it must be admitted, that he stood infest in these lands, in security of the debt in question.

The only answers made upon the part of the pursuers to this plea, were, *1mo*, That it does not appear from any thing in process that Mr Corthine was ever infest in the lands of little Batturick, upon the disposition granted to him by Hutchison and Donald. *2do*, That the tripartite contract, by which alone the benefit of Mr Corthine's infestment (if any such existed) could be communicated, either to Mr Dunlop himself, or to the trustees for his creditors, was not signed by Mr Dunlop till the second day of July 1765; and that, of course, the debt due by Hutchison was not heritably secured, when the pursuers used their arrestments in Mr Hutchison's hands, of the 4th of April 1765; and therefore was legally attached by that arrestment. *3tio*, That although the tripartite contract had been compleated upon the 21st of February 1765, by being signed by Mr Dunlop, of that date, as well as by the other parties; yet, as that contract was a mere personal agreement, whereby Mr Corthine obliged himself to account to Mr Dunlop, proportionally for the produce of certain effects conveyed to him partly heritable, partly moveable, belonging to Hutchison the common debtor, Mr Dunlop's interest in that contract could be considered only as a mere personal interest, subject

to the diligence of arrestment, and fell of course to be carried by the pursuers arrestments used in Mr Corthine's hands. And, *lastly*, That as Mr Hutchison did not cease to be debtor to Mr Dunlop, and obtained no discharge by the contract from him, the original grounds of debt still remained, and were effectual against Hutchison the common debtor; and consequently any creditor of Dunlop's was at liberty to arrest in the hands of Hutchison, and thereby to affect the *jus crediti* in his hands.

But to these answers the petitioners beg leave to reply, in the *first* place, That although Mr Corthine's infestment has not been produced in process; yet he was *de facto* infest as early as the 27th of December 1764, upon the *ex facie* absolute disposition granted to him by Hutchison and Mr Donald, and the instrument of seifine was registered in the general register at Edinburgh, upon the 29th day of the same month, where the pursuers may see it if they please.

In the *next* place, the reason why Mr Dunlop did not sign the tripartite contract at the time when it was signed by Mr Corthine and Mr Hutchison, was, that he was at that time in the Isle of Man, where the petitioners the trustees for his creditors had sent him, in order to settle and secure a considerable debt in that island, which was in danger of being lost. Indeed, Mr Dunlop did not so much as know, at that time, that Mr Corthine had been brought to terms. The bargain was concluded, and the contract settled by the petitioners agent, without the least possibility of Mr Dunlop's taking any personal concern in it. The petitioners thought then, and think still, that, being invested in all Mr Dunlop's effects, they had a right to use his name in any transaction of this kind; nor would they have thought of taking any conveyance from him to his interest in the tripartite contract, had they not been sending him out to America, where the situation of the trust-estate required his presence for some years. This circumstance, however, seems to be a matter of little or no consequence; because the only thing that Mr Dunlop did by the deed, was his assigning to Mr Corthine the before mentioned L. 200 bill accepted by William and James King, which, in fact, was previously put into Corthine's possession. The transaction,

transaction, so far as it tended to give real security to Mr Dunlop for the debt due to him by Hutchison, and to render that debt heritable, was fully completed upon the 21st of February, when the deed was signed by Hutchison and Corthine. From that moment, the debt due to Mr Dunlop became a burden upon the lands of Little Baturick; and although that burden was held in trust for Mr Dunlop and his creditors by Mr Corthine, it was on the same footing with the debts due to Mr Corthine himself, which were undoubtedly heritably secured by his investment. That investment was originally only meant to secure Mr Corthine's own debts; but, the moment that he saw that the petitioners had it in their power to set aside that security, he agreed to communicate the benefit of it to them; and for carrying that agreement into effect, no more was necessary than to execute a deed by him and Hutchison, declaring, that the lands were disposed to him in security of that debt, as well as his own. This was accordingly done prior to any arrestment; and, of course, the posterior arrestments used by the pursuers can be of no avail.

It is nowise requisite to render a moveable debt real, that the creditor shall sign, or be a party to the deed by which the heritable security is granted. An heritable bond is only signed by the debtor. But still it is sufficient to render the debt an heritable right. The law presumes, that such security is granted at the desire of the creditor. And as, in the present case, the real security was expressly stipulated by the petitioners, and as it was agreed to, both by Mr Hutchison the proprietor, and by Mr Corthine, who stood invest under an absolute disposition, that the lands should be burdened with the debt due to Mr Dunlop, that debt became heritable the moment that a deed to that purpose was signed by them.

The pursuers were, indeed, pleased to observe, upon this head, that there is a great difference between an heritable bond granted by the debtor, and delivered to, and accepted of by the creditor, which is a complete transaction, and a mutual agreement of this kind, which could only be completed by the execution of the contract and subscription of all parties; for, that the law cannot
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presume, that a party has bound himself by a contract untill he has subscribed it, and will not permit the nature of a creditor's security to be innovated or altered, so as to affect either himself, his heirs, or his creditors, without any act and deed done upon his part, to signify his consent to such alteration. And, in support of this argument, it was further observed, that although by a debtor's disposing his lands to his eldest son, with the burden of particular debts, these debts may be rendered heritable so far as regards his own succession, yet, such debts, *quoad* the creditor's succession, will, in no shape be affected with such settlement, to which he is no party, and will continue moveable, and of course descend to his executors.

This argument can, however, have no influence upon the question. There is no dispute, at present, concerning the rule of succession; the only point to be considered is, Whether, by the subscription of Mr Hutchison and Mr Corthine, to the tripartite contract, the lands belonging to Hutchison were burdened with the debt due to Mr Dunlop, and that debt made a real lien upon these lands? But, that this was the case cannot admit of a doubt and, as it must of consequence follow, that the debt was, from that moment, heritably secured, it is certain, that it could not thereafter be attached by arrestment. Whether this debt would have descended to Mr Dunlop's heir or his executors, it is altogether unnecessary to enquire, as the solution of that question can have no influence whatever upon the point at issue. At the same time, the petitioners will be allowed to observe, that, if there had been room for that question, the debt must have been descendable to Mr Dunlop's heir and not to his executors, after the contract was signed by Hutchison and Mr Corthine, because it was rendered heritable in that manner, not of their accord, without his advice, or the advice of the trustees, but upon their special interposition. The very nature of the transaction pre-supposes Mr Dunlop's consent, as much as if an adjudication had been led in his name; and the effect of that species of legal diligence was never doubted by any person. This

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being the case, the petitioners need scarcely add, that the case put by the pursuers of a person disposing his lands to his eldest son, with the burden of particular debts, does by no means apply, in respect that tho', by so doing, he lays the payment upon his heir; yet he does not render them real liens upon his heritable subjects.

What the petitioners have urged upon this point, must likewise afford a sufficient answer to the other plea maintained by the pursuers, that Mr Dunlop's interest in the tripartite contract, was a mere personal interest, which was subject to the diligence of arrestments; for, if your Lordships are satisfied, that, by that contract the debt due to him was made a real burden upon Hutchison's lands, his interest was of a very different nature from a mere personal interest. It may indeed be true, that the contract would have produced only a personal action against Mr Corrhine, who stood *ex facie* in the absolute property of the lands. But it is equally certain, that as such personal obligation, had for its origin, a trust in Mr Corrhine's person for Mr Dunlop; so the subject of that trust was an heritable right, which could not possibly be carried by arrestment.

Nor is it in the least degree material to the question to observe, that the personal obligation upon Hutchison still remained. The same thing obtains in every case, either where an heritable security is granted *ab origine*, or where it is granted as a separate security; but it surely never was hitherto maintained, that, after a debt was rendered properly heritable, it was still subject to be attached by arrestment, because the personal obligation was not totally extinguished when the heritable security was granted.

Nor will it avail the pursuers to contend, that, as the effects belonging to Hutchison, for which Mr Corrhine was bound to account, were partly composed of a bill due by the two Kings indorsed by Hutchison to Mr Dunlop himself, and by him to Mr Corrhine, it must be admitted, that this was a mere personal subject, and that Mr Corrhine's obligation to account for the same cannot, with the smallest shadow of propriety, be said to be an heritable or real security. For as, by the tripartite contract, the whole debt due by Hutchison to Mr Dunlop was rendered heritable, no part of that debt could

could be carried by arrestment; and it is of no consequence whatever, that, besides the heritable security then established, another security, which had been given by Hutchison while it was perfectly moveable, was allowed to remain. It may also here be observed, that, as James King, one of the accepters of the bill now in question, is a man of substance, it is very incredible that Hutchison, who was exceedingly poor, would have allowed it, as he did, to lie over for 13 years, if he had not been conscious that good exceptions lay against it; and the fact is, that though the indorsation to Mr Dunlop was accepted of *ut valeret quantum valere potuit*, yet very little was expected from it. But, even supposing this bill to have been a most unexceptionable debt, the petitioners are at a loss to discover how the pursuers can derive any advantage from it. An arrestment in Hutchison's hands could never have carried it without at least obtaining a decret of forthcoming against him, and thereupon arresting in the hands of the Kings, the accepters; and it is evident, that, in virtue of the indorsation to Mr Dunlop, the petitioners had it in their power to recover from these accepters whatever could be made, long prior to the arrestment used by the pursuers in the hands of Hutchison. Indeed, the petitioners apprehend, that no arrestment in Hutchison's hands, subsequent to the indorsation to Mr Dunlop, could possibly carry this bill. If therefore the pursuers can derive any advantage from it whatever, it must be in consequence of the tripartite contract, and their subsequent arrestments in Mr Corthine's hands. But then these arrestments could have no effect at all, unless Mr Corthine, at the date of them, had recovered payment from the Kings; for, though he was indorsee, he surely was not debtor, on account of that bill, to any person, until he recovered payment of its contents.

The petitioners shall only further observe, upon this branch of the argument, that, even supposing this tripartite contract to have been good for nothing till it was signed by Mr Dunlop as well as the other parties, the steps hitherto taken by Mess. Brown, Yule, and company, cannot avail them in the present competition; for, although the arrestment used in Hutchison's hands might have intitled them to
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bring a process of forthcoming, yet they could not, in consequence thereof, pretend to affect his heritable subjects, without leading an adjudication. No such adjudication, however, could be effectual after the conveyance to Mr Corthine, in consequence of which he stood infeft prior to any of their arrestments; and, if Mr Corthine's infeftment would have been sufficient to have barred the arrestmenting creditors from attaching Hutchison's heritable subjects for the sums for which they might have obtained decret of forthcoming against him, the petitioners are at a loss to discover how the arrestment used in Hutchison's hands, can intitle them to affect the price paid to Mr Corthine by the persons to whom he sold the subjects in which he stood infeft, as already mentioned. The subject of competition must still be considered as in the same situation in which it stood when the arrestment was used. The only question therefore that remains upon this head, is, Whether the arrestment used in Mr Corthine's hands upon the 17th of October 1766 can avail Mess. Brown, Yule, and company? And the petitioners, with all submission, apprehend it cannot; for this very good reason, that whether Mr Hutchison or Mr Corthine shall be considered as debtors to Mr Dunlop at that time, the debt so due to him stood heritably secured upon Hutchison's lands of Little Battunick, in consequence of the tripartite contract of the 21st of February and 2d July 1765, by which these lands were subjected to the payment of that debt.

The pursuers were indeed pleased, in some of their last papers, to found upon the arrestment used in the hands of James Graham the purchaser from Mr Corthine; and the Lord Ordinary, in his last interlocutor, has been pleased to reserve the consideration of the question, so far as concerns the said James Graham, until he shall depone, and it shall appear whether he had effects of Mr Dunlop in his hands when the arrestment was used, or not. The petitioners must however be allowed to observe, that they are at a loss to understand both the pursuers plea in this respect, and the Lord Ordinary's interlocutor as adapted thereto, as it seems to them altogether impossible that the arrestment used in Mr Graham's hands can at all avail the pursuers, seeing that the Lord Ordinary, by his interlocutor

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of the 23d of December last, which has ever since been acquiesced in by the pursuers, found in the most express terms, ' That they can take nothing in virtue of their arrestments in the hands of John Campbell, John Schaw, and James Graham, in respect none of those persons were debtors to James Dunlop.' If indeed the pursuers can qualify that James Graham was debtor to Mr Dunlop in any other shape than as purchaser of the subjects in question from Mr Cortchine, they may no doubt insist against him, upon the supposition that they are intitled in all events to compete with the petitioners in their character of trustees for the creditors in general. But if, by their arrestment in Mr Graham's hands, they only mean to attach Mr Dunlop's interest in the price of the lands of Little Baturick, they must certainly be most effectually foreclosed by the final interlocutors already recited.

The petitioners having thus endeavoured to show, *first*, that in the character of trustees for the creditors in general, they are preferable to the pursuers, and, *secondly*, that the diligence used by the pursuers was perfectly inhabile to attach the subjects in question, they apprehend that they might stop here without giving the court any further trouble. But, as they are acting not for themselves only, but for a number of other creditors who repose confidence in them, they consider it to be their duty to lay every thing before your Lordships; and, on that account, hope to be forgiven for taking up a little more of your time in stating an additional plea which, independent of what has been already said, ought, in their humble opinion, to procure a preference in their favour over the subjects in competition.

The separate plea here referred to, is, that, as the subject of the present competition has in effect been created by the act and deed of the petitioners, it would be repugnant to the common principles of equity and justice, to allow any particular creditor, who has not thought proper to accede to the trust-right, to carry off that subject from all the rest, in payment of his own private debt.

Your Lordships have already been informed, that the 60 days from the date of Mr Cortchine's infestment were nearly elapsed before the agreement was made, in consequence of which, the bene-

fit of that investment was communicated to the debt due by Hutchison to Mr Dunlop. Had these sixty days been allowed to expire, Mr Cornhill would have held the lands in security of his own debt only, and would have laughed both at Mr Dunlop and the trustees for his creditors, if they had pretended to compete with him; but, when he found that the trustees had it still in their power to annihilate his security, by rendering Hutchison bankrupt in terms of the act 1696, he was glad to compromise matters, and to admit them to a share of the heritable security which he had obtained, in proportion to their debt. It was therefore owing entirely to the act and deed of the trustees, and to their attention to the interest of the creditors, that the subject of the present competition is in existence; and that being the case, it is humbly submitted to your Lordships, that it would be the height of injustice to allow a particular creditor, who had done nothing to secure his own interest, to take the benefit of that attention, and to run away with the subject thereby created, to the exclusion of all the other creditors.

In this argument, the petitioners do not mean to insist that a stop should be put to creditors using the diligence of the law; but what they contend is, that particular circumstances may occur to render it inequitable and unjust to give countenance to such diligence, and to induce your Lordships to interpose your authority to prevent its taking effect. For example, an arrestment used by a favourite creditor, in consequence of information given him by the bankrupt debtor, has been altogether disregarded by the court. This, however, could not proceed from an idea either of the impropriety in the conduct of the arrester, who was certainly in *bona fide* to take every method to secure his own payment, or of any objection lying to the mode of using the arrestment. The footing, therefore, upon which such judgement proceeded must have been no other than this, that it appeared unjust, and contrary to the rules of equity, to allow one individual creditor to take an advantage to himself from private information given by the debtor, to the exclusion of

of the other creditors, to whom no such communication was made. But it is surely still more repugnant to the principles of equity, to allow a particular creditor, who has lain by, with his hands a-crofs, for more than a year after his debt became due, to carry off from all the other creditors, a subject which would not have existed, had it not been for the diligence and attention of those other creditors, or their trustees, to whom they had made over their debts.

Let it be supposed, that a debtor, who had granted a trust-disposition for the behoof of his whole creditors, had a right to claim an estate that belonged to his predecessor, but was settled upon another person by a deathbed-deed; and that the trustees, in order to do the most effectual service to the creditors in general, should take the necessary steps for setting aside the said deathbed-deed, and prevail in a reduction thereof; and that the heir from whom they obtained the trust-disposition should die immediately thereafter; Would it be competent to a particular creditor, who had done nothing to secure himself during the heir's life, to attempt, by using diligence after his death, to carry away such estate from the trustees? Would it not be a sufficient answer for them to say, That the subject was created by their own act and deed, so far, at least, as to become a fund of competition amongst the apparent heir's creditors; and that, on that account, justice ought not to permit any particular creditor, who had taken no step to secure it to himself, to carry it off from the trustees for the creditors in general.

The case here put is not, however, more favourable than the present; for, if the petitioners had not interfered in the manner they did, by raising diligence against Hutchison, to enable them to render him bankrupt in terms of the act 1696, within 60 days after the date of Mr Corrhine's infestment, and taking the opinion of counsel, in order to convince him of his danger, Mr Corrhine would have carried off the whole subject of the present competition in payment of the debts due to himself; but, by the measures taken by the petitioners, Mr Corrhine found it necessary to communicate the benefit of that infestment to Mr Dunlop and his creditors. And it would surely be highly unjust, that the pursuers, who lay by with their

their arms a cross, without ever thinking of arresting in Hutchison's hands, until the debt due by him to Mr Dunlop, was really secured, should have it in their power to run off with the subject which was in this manner created, by the vigilance and attention of the petitioners, acting in character of trustees for the creditors in general.

Many other cases of a similar nature might be figured: But the petitioners having already detained your Lordships too long, shall content themselves with referring to one or two decisions, which seem to them to be applicable to the present question.

The first of these decisions was pronounced in a question between the trustee for the creditors of West Diggs comedian, and one or two particular creditors of that gentleman. Mr Diggs had retired from this country from a dread of personal diligence; and, as his creditors had nothing to depend on for their payment but the fruits of his industry as a player, the most of them joined in granting him a *superfedere*, upon the condition of his making over to a trustee, for the general behoof, a certain portion of the salary he should receive from the managers of the concert-hall. This condition Mr Diggs agreed to, and returned to this country to perform again upon this stage; and one or two private creditors having used arrestments in the hands of the managers, a competition ensued between them and the trustee for the creditors in general; and your Lordships, upon considering the particular circumstances of the case, were justly of opinion, that no effect ought to be given to those arrestments, the tendency whereof was to carry off from the creditors in general, a fund which would not have existed, had it not been for the act and deed of these creditors in granting the *superfedere*.

The other decision was pronounced only last session, in a question between the petitioners and other non-acceding creditors of Mr Dunlop, viz. Messrs Thomas Peter, and William Bogle, and Robert Marshall, of Glasgow. These creditors had arrested a parcel of tobacco and staves, which had been remitted from America to the petitioners, as trustees for Mr Dunlop's creditors in general; and, although

though arrestments were used both in the hands of the ship-master, and in the hands of the petitioners ; yet your Lordships found, that the goods could not be carried by these arrestments, and sustained the plea which the petitioners maintained for the behoof of the creditors in general, viz. That, as they had, by their attention and vigilance, recovered these goods in America, under the trust-right which in that country was liable to no exception, no particular creditor could be allowed to carry them off by legal diligence, after they were brought in to this country for the behoof of the whole.

The application of these decisions to the case in hand, is too obvious to require any illustration. The trust-disposition was, even in this country, a good title for the petitioners to demand payment from any of Mr Dunlop's debtors. It was likewise a good title for them to take corroborative securities for debts due to him ; and, as it was entirely owing to their act and deed in compelling Mr Corthine to admit them to a share of the security granted to him over Mr Hutchison's estate, that part of the price of that estate can be claimed by Mr Dunlop's creditors, it would, therefore, be highly unjust to allow a particular creditor to run off with the whole of that subject, to the exclusion of the others, for whose behoof it was recovered. And, in this branch of the argument, the petitioners are under no necessity to plead, that the pursuers were barred by the deed of trust from using arrestments in Hutchison's own hands, as properly debtor to Mr Dunlop. They have already taken a decret of forthcoming against him upon their arrestment ; and, if they are able to effectuate their payment out of his other funds, they shall be welcome to do so, in the event that your Lordships should incline to repel the plea maintained by the petitioners on the general point : But, as it is next to certain that they can make little or nothing in that way, it would, with all submission, be highly unjust to allow them to take advantage of what the petitioners have done in another way, in order to secure the debt due by Hutchison, for the behoof of the creditors in general.

The petitioners have only now to beg your Lordships forgiveness for the length of this paper ; and they are hopeful that you will have no difficulty, either upon the general point, or upon the particular circumstances above stated, to give them relief against the judgment pronounced by the Lord Ordinary in favour of the pursuers.

May it therefore please your Lordships to alter the Lord Ordinary's interlocutors, in so far as they are complained of, and to find, that the petitioners, in virtue of the trust-right, are entitled to be preferred to the subject of competition ; or, at least, to find that, in respect of the peculiar circumstances attending this case, the pursuers can carry nothing in virtue of the arrestments used by them, and therefore to prefer the petitioners.

According to justice, &c.

ALEX. WIGHT.